



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: The Department of the Air Force--
Reconsideration

File: B-247417.2

Date: October 6, 1992

Raymond Moore for the protester,
Joseph M. McDade, Jr., Esq., Department of the Air Force,
for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. General Accounting Office will not consider new arguments raised by the agency in request for reconsideration where those arguments are derived from information available during initial consideration of protest but were not argued, or from information available but not submitted during initial protest, since parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril.

2. Decision recommendation--to amend overly restrictive solicitation--is modified to provide that agency need not cancel solicitation (even though it conducted bid opening while the initial protest was pending at our Office) in order to revise and resolicit the agency's requirements where, after consideration of all the circumstances surrounding the procurement, including new information discovered after the initial decision was rendered that documents recent failures of direct buried systems similar to the protester's, the agency's need to have a new heat distribution system in place as soon as possible for the upcoming heating season, and the cost to the government, cancellation would not be in the best interests of the government.

DECISION

The Department of the Air Force requests reconsideration of our decision in Moore Heating and Plumbing, B-247417, June 2, 1992, 92-1 CPD ¶ 483, in which we sustained Moore's protest challenging the specifications as overly restrictive in invitation for bids (IFB) No. F33601-92-B-0008, issued by the Department of the Air Force for a project involving the

replacement of a steam heat distribution system and the installation of a steam boiler at Wright-Patterson Air Force Base. We found that the Air Force unreasonably restricted the competition to above-ground trench systems and excluded all types of direct buried systems based on a life cycle cost analysis which considered only the cathodically protected steel conduit direct buried system.

We affirm our prior decision.

In its protest, Moore claimed that the IFB was overly restrictive in prescribing the use of a shallow concrete trench above-ground distribution system¹ without permitting as an option the use of a direct buried underground heat distribution (UHD) system.² According to Moore, the agency should have permitted as alternatives to the concrete trench system, any "problem free" direct buried systems that have been deemed acceptable.

Our decision pointed out that agencies are required to specify their needs and select their procurement approaches in a manner designed to promote full and open competition. See LaBarge Prods. Inc., B-232201, Nov. 21, 1988, 88-2 CPD ¶ 510. We also pointed out that a specification in a solicitation for UHD systems is not improper merely because it may prevent an approved supplier from competing. PittCon Preinsulated Pipes Corp., B-209940.2, July 11, 1983, 83-2 CPD ¶ 70. Nevertheless, we noted that restrictive provisions should only be included to the extent necessary to satisfy the agency's needs. Southern Techs. Inc., B-239431, Aug. 31, 1990, 90-2 CPD ¶ 191; PhilCon Corp., B-206641 et al., Apr. 12, 1983, 83-1 CPD ¶ 380.

We also discussed a recent decision, Moore Heating & Plumbing, Inc., B-246740, Apr. 1, 1992, 92-1 CPD ¶ 333, aff'd, B-246746.2, July 22, 1992, 92-2 CPD ¶ 37, in which we found that a specification used in a procurement by the Department of Veterans Affairs (VA) prescribing the use of a shallow concrete above-ground distribution system without permitting as an option the use of a direct buried UHD system was not overly restrictive. We found that the record

¹A shallow trench system uses a buried concrete pipe which is large enough to hold the set of steam lines. The steam and condensate pipes with insulation are hung on stands off of the trench floor. All water that gets in the trench is drained to a slump or storm sewer.

²A direct buried piping system consists of steam and/or condensate line with insulation installed within another thinner pipe.

supported the agency's decision based on three factors; (1) the ease of maintenance offered by a concrete trench system was necessary because of inadequate maintenance staffing at the VA facility involved; (2) the concrete trench system is easier to modify, an important consideration in that case because of the agency's plans to expand the facility; and (3) the concrete trench covers may be used as sidewalks.

Unlike the VA in Moore, B-246740, supra, the agency here relied solely on the results of a life cycle cost analysis as justification for its decision to restrict competition. The cost analysis compared the above-ground shallow trench system and one type of direct buried distribution system already in use at Wright-Patterson; that system is designed using cathodically protected steel conduits. The analysis showed that the above-ground concrete trench system had the lowest life cycle costs.

Applying the principles involving the use of restrictive specifications, we found that the specification overstated the agency's minimum needs because the cost analysis did not support the agency's decision to exclude all types of direct buried systems; rather, it merely supported the exclusion of the cathodically protected steel system. The Air Force's only attempt to explain its exclusion of fiberglass encased direct buried systems like the protester's was its two-paragraph technical statement prepared in response to the protest to support its decision to restrict competition. In that statement, the Air Force asserted that it has had one manufacturer's fiberglass direct buried system in place at Wright-Patterson since 1988, and that the long-term reliability of this system has not been established. Instead of providing evidence in the record that the agency evaluated its capabilities and the feasibility of using a fiberglass system, the agency merely stated--after the fact--that based on unspecified failures of this manufacturer's system at other installations, there are potential problems associated with the system that are undesirable. The agency never explained the nature and extent of these problems. Thus, we sustained the protest and recommended that the Air Force amend the solicitation to properly reflect the minimum needs the agency has described and exclude only the cathodically protected conduit design direct buried system considered in the life cycle cost analysis.

In its reconsideration request, the Air Force argues that our decision is erroneous because we did not consider several factors that justify the agency's exclusion of all direct buried systems. First, the agency points to our decision in Moore, B-246740, supra, and states, for the first time, that the three factors present in that case are present in this

case.³ In addition to the factors from the other Moore decision, the Air Force also for the first time states that the exclusion is justified because of these factors: (1) an above-ground shallow concrete trench will permit the use of stockpiled fiberglass piping that was obtained by Wright-Patterson in a contract termination case; (2) an above-ground shallow concrete trench system will avoid an asbestos abatement project; (3) the venting and steam leak problems associated with direct buried systems are avoided by using an above-ground system; and (4) a December 1991 Corps of Engineers study concludes that a shallow concrete trench system is preferable to a direct buried system. While the Air Force now offers these reasons for excluding all direct buried systems, the agency does not offer any reasons why it did not include these arguments in either its request that we summarily dismiss the protest or its subsequent agency report on the protest.

It is not our role to construct arguments for agencies or to create reasons to justify the agency's use of restrictive specifications. To the extent the Air Force's current argument that the exclusion of all direct buried systems is justified is based on information available during our initial consideration of the protest, the agency should have raised the factors it now cites as warranting the restriction at that time. Department of the Navy--Recon., B-228931.2, Apr. 7, 1988, 88-1 CPD ¶ 347; Newport News Shipbuilding and Dry Dock Co.--Recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428. Failure to make arguments in response to a protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our decisions. Id.

We find unpersuasive the Air Force's argument that the decision is erroneous because we did not consider information that the agency itself failed on two occasions to mention in its submissions. The protester specifically argued that the exclusion was unreasonable because it was based on the cost analysis of only one type of direct buried system. The reasonableness of the exclusion clearly was the crux of the protest, as was the protester's objections to the agency's reliance on its incomplete cost analysis to justify the exclusion. Accordingly, the agency, in

³As stated above, the three factors are as follows: (1) the ease of maintenance offered by a concrete trench system is necessary because of inadequate staffing at Wright-Patterson; (2) the concrete trench system is easier to modify; and (3) the concrete trench covers may be used as sidewalks.

responding to the protest, was obligated to fully discuss the bases for its decision to restrict the field of competition. It could not provide only a limited response to the protest and then, when the protest was sustained, first offer other bases justifying the protested specification when that information was or should have been available to it during our initial consideration of this matter.

The Air Force also argues, in any event, that even if our original decision is correct to the extent that the agency failed to show that its restriction was reasonable, we must modify our recommendation that the agency amend its solicitation in light of some factors that we were not aware of while the protest was pending at our Office, namely, the fact that the agency held bid opening before receiving our decision and the agency's discovery--after the decision was rendered--that there have been recent failures of direct buried systems which use fiberglass encasing like the protester's. More importantly, the agency states that while cancellation is typically required in instances such as these, cancellation would not be in the best interest of the government because the cancellation of the solicitation would require cancellation of the entire project. According to the agency, compliance with our recommendation requires an entire redesign effort either by an architect-engineer (A-E) firm (two of the areas of the current project design were done by an A-E firm), or by the Air Force's in-house engineers (who performed the design work for the other areas of the project). The agency states that it does not have the funds available to acquire the design services; that there is insufficient time to select an A-E firm and make award for the repair work before the funds available for the project expire; and, with regard to the part of the project designed by in-house engineers, the design work would take at least 2 months and would adversely affect work on other current design projects.

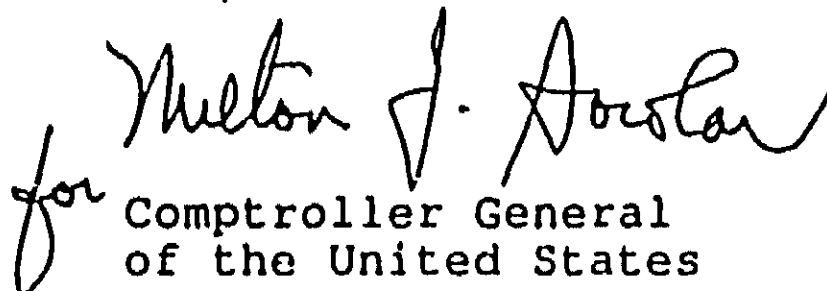
Since bid opening has occurred, amendment of the IFB is not possible. Rather, as the Air Force states, the specifications can be revised only through IFB cancellation. Thus, as our recommendation can be effectuated only through cancellation, we must consider whether the recommendation remains an appropriate one.

In determining the appropriate recommendation in cases where we find a violation of procurement laws or regulations, we consider all the circumstances surrounding the procurement, including the seriousness of the procurement deficiency, the degree of prejudice to other offerors, interested parties or the competitive procurement system, the good faith of the parties, the extent of performance, cost to the government,

the urgency of the procurement, and the impact of the recommendation on the user or contracting agency's mission. Science Applications Int'l Corp. et al.--Recon., B-247036.2; B-247036.3, Aug. 4, 1992, 92-2 CPD ¶ ____. This determination necessarily involves the balancing of competing interests. Here, balancing the interests presented, we conclude that cancellation of the IFB would not be in the best interests of the government because of the impact on the agency's mission.

As discussed above, the Air Force states that the cancellation and resolicitation would result in at least a 2-month delay in order for its engineers to design the project for use of an underground UHD system. There may also be further delay in light of the funding problems. The record also shows that portions of the heat distribution system at Wright-Patterson are badly deteriorated, rendering the entire system unreliable. According to the Air Force, there is a risk of catastrophic failure of this system if the Air Force is required to utilize the present distribution system during the 1992-1993 heating season. In summary, the record shows that cancellation of the current solicitation would result in unacceptable delays that could adversely affect the well-being of Wright-Patterson personnel and their ability to accomplish their assigned mission. On balance, therefore, we find that it is not in the best interest of the government to cancel the solicitation.

The prior decision, sustaining Moore's protest, is affirmed except that the recommendation is modified to provide that the Air Force need not cancel the current solicitation and resolicit its requirements upon revision to include direct buried heat distribution systems like the protester's. Moore is still entitled to recover the costs of pursuing the protest and is also entitled to recover the costs of responding to the Air Force's request for reconsideration. Moore should submit its certified claim for these costs directly to the agency, within 60 working days of receipt of this decision. 4 C.F.R. §§ 21.6(d) (1), (f) (1).


for Comptroller General
of the United States